No. 3521

United States Circuit Court of Appeals

For The Ninth Circuit

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Plaintiffs in Error,

—vs.—

ETTA EICHELBARGER and STANLEY EICHELBARGER, her husband,

Defendants in Error.

WRIT OF ERROR TO UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF PLAINTIFFS IN ERROR

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THE FACTS.

Defendants in error sued for damages alleging that Plaintiffs in Error were the owners and operators of a large Circus, and that on the 21st day of June, 1917, they gave a large show and circus at

Toppenish, Washington; that Defendant in Error, Etta Eichelbarger, attended said show and paid her admission and was directed by an attendant in the employ of Plaintiff in Error to take a seat in a row of seats temporarily constructed under canvas and accessable only by walking from the lower seat up across the seats to the upper tiers of said row of seats and in pursuance of said directions said Etta Eichelbarger stepped upon said seats and went up near the top of said row of seats for the purpose of choosing a seat, and in so doing, said Plaintiff stepped upon a seat which was in said row or bank, which when stepped upon broke and precepitated the said Etta Eichelbarger down through said row or bank of seats to the ground beneath, a distance of about ten feet; that the said seat was weak and defective and the said accident was caused solely by the negligence of defendants in placing in said row or bank of seats the said defective and weak seat, and directing the said plaintiff, Etta Eichelbarger, as aforesaid to seek a seat in the said row or bank, and for that purpose to step upon the said seats; that the said Etta Eichelbarger was free from negligence and said accident was caused solely by said negligence of Plaintiffs in Error and that the said plaintiff was injured and damaged in the sum of Ten Thousand ($10,000) Dollars.

Transcript of Record, pages one to five, Plaintiffs in Error answered denying the material allegations of said complaint and pleading contributory negligence. Transcript of Record, pages 18

to 20, Defendants in Error replied denying contributory negligence. Transcript of Record, pages 21 to 22. The trial was had before Judge Cushman and a jury.

Defendant in Error, Etta Eichelbarger, testified in her own behalf; that she went to Toppenish to see the Circus; that her brother-in-law bought the tickets; that one row of seats was pretty well crowded, but there were some seats at the top that were not filled and we thought we would go up along the side of the seats that were pretty well filled up, and I said I can't walk that narrow path, and the attendant said come down here and go up. We went down to a row of seats that were empty and then went up across the seats to the top. All the rest were ahead of me except Fred Eichelbarger. The seat board broke and I fell through the seats; the seats were not very wide; were one above the other on kind of cleats; there was no aisle or other place to go up except across the seats and they ran around the circus on each side of the reserved seats. There was no one sitting on the board that broke; they were sitting pretty close on the other side of the board; at the time I stepped on the seat that broke there was no one else on it. I went right down through and the piece of board came down with me. Transcript of Record, pages 30 and 31.

CROSS EXAMINATION.

We were not going into the reserve seat section but into the general admission section; we were not being conducted to a seat by an usher, but he

showed us up the seats. He just stepped back and said, "Pass on up those seats." We were going to the upper seats, stepping up the seats which were made of loose plank, lying on bents in the nature of steps one above the other; the board that broke was about 10 or 12 feet from the ground; there was nothing on the ground where I fell. I weigh 195 now and weighed about the same at the time of the accident. Transcript of Record, page 33.

J. F. Eichelbarger testified in behalf of plaintiff, that he went with Mrs. Eischelbarger to the Barnes Circus at Toppenish; that he paid for her admission; that a young fellow from the Circus directed us up to seats and we all went up the way he directed us. As we got within two rows of the top my sister-in-law stepped on a board and then it broke through. I made a clutch for her, being right behind her, and caught her under the arm and we both fell through. Nobody was standing on the seat near her at the time. One of the boards that broke fell down on one side cutting my arm and going into the ground for about a foot; the seats were just laid on steps one above the other, going clear around the tent. There was no aisle or other places to walk up, they had a man there to show you and they walked right up across the seats; everybody did that at the direction of the attendants. Transcript of Record, pages 45 and 46.

CROSS EXAMINATION.

I saw the board after it was broken. I did not examine the board as to whether there was any-

thing wrong with it, but from the way the board split, I should judge it was not a perfect board. It seemed otherwise to be a perfectly good board and broke right through; there was not a thing that would indicate to anybody of average preception that it was not safe to walk on. My judgment would have been that it was just as safe as any of the other boards there to walk on. I did not examine the board in particular, nothing only the depth in the ground. I should judge the board was about six or eight or maybe ten inches wide, something in excess of one inch thick; I know that it was a painted board; it was not oak, or hickory or ash; it must have been some light board because it broke with the grain the length of the board, instead of breaking crossways it broke slanting. I should judge the sliver ran down into the ground about a foot and that the board broke about that distance. The bents, I should say from measuring the seats in Seattle, were 12 feet apart. The one that broke was no longer than any of the rest. Transcript of Record, pages 45 to 47.

The above is all the evidence that was introduced tending to show negligence of the Plaintiffs in Eror.

At the close of plaintiff's evidence the Plaintiff in Error challenged the sufficiency of the evidence and moved for a judgment of dismissal for the reason that there was not sufficient evidence tending to show negligence on the part of Plaintiffs in Error, and for a judgment of non-suit; that

motion was denied and an exception taken. Transcript of Record, page 48.

The verdict of the jury was for the plaintiffs in the sum of Five Thousands ($5,000) Dollars. Transcript of Record, page 59.

A motion was filed for a new trial in said cause and denied by the court. Transcript of Record, pages 23 to 25.

Ajudgment was entered upon the verdict. Transcript of Record, page 27.

ASSIGNMENTS OF ERROR.

I.

The court erred in giving the jury the following instruction:

> "If you believe from the evidence that the defendant, Al. G. Barnes Show Co., used ordinary care in the selection of the material from which it constructed the seats used at the time in question, and that there were no apparent defects in the seat that broke which, in the exercise of reasonable care and caution, the said defendant should or might have discovered, and that the said accident and injury to the said plaintiff was caused by some latent and hidden defect which the said defendant, in the exercise of ordinary care, prudence and caution, could not have discovered, then (54) and in that event your verdict should be for the defendant. It is not enough for you to find that the seat broke and precipitated the plain-

tiff, Mrs. Eichelbarger, to the ground below, thereby causing her injury, but you must go further and find that the defendant the Al. G. Barnes Show Company, has been guilty of negligence; and that said defendant did not exercise that degree of care and caution as is ordinarily and customarily used by other men in carrying on and conducting a like business; but the facts and circumstances under which the board broke may be taken into consideration by you in determining whether or not an ordinary careful inspection of the board would have disclosed some defect in it or weakness." Transcript of Record, page 57.

II.

The court erred in denying Plaintiffs in Error's motion for a dismissal and for a non-suit at the close of plaintiff's evidence, for the reason that the facts and circumstances proven did not authorize the inference of negligence on the part of Plaintiffs in Error, and for the reason that no negligence was shown on the part of Plaintiffs in Error and for the reason that the facts and circumstances proven were just as consistent with the theory that the damage was caused by an accident for which the Plaintiffs in Error were not responsible, and for the reason that the evidence did not justify the submission of the case to the jury.

III.

The evidence is not sufficient to sustain either

the verdict or the judgment, and the verdict and judgment are contrary to law.

IV.

The court erred in denying plaintiff's motion for new trial for the reason embodied in said motion, and entering judgment on said verdict to each and all of these assignments the Plaintiffs in Error duly excepted respectively.

ARGUMENT.

I.

The first assignment of errors is based upon the instruction of the court to the jury set out in said assignment. In that instruction the jury are told, "It is not enough for you to find that the seat broke and precipitated the plaintiff, Mrs. Eichelbarger, to the ground below, thereby causing her injury." We respectfully submit that that is all that the plaintiff proved in this case. The circumstances surrounding the breaking of the board, it would seem does not aid in any manner to show negligence on the part of Plaintiffs in Error. The last paragraph of said instruction is as follows: "But the facts and circumstances under which the board broke may be taken into consideration by you in determining whether or not the ordinarily careful inspection of the board would have disclosed some defect in its weakness." In the first paragraph here quoted the jury are told that it is not enough for the plaintiff to simply prove that the seat broke. In the second paragraph the jury are told that they

may take into consideration the facts and circumstances under which the board broke. We submit these two statements are contradictory because there are no circumstances, there are no facts in addition to the fact that the board broke. The instruction is contradictory in saying that the breaking of the board is not enough, and in saying that they may take into consideration the facts and circumstances under which the board broke when there are no facts or circumstances which would in any manner throw light on the question of whether a careful inspection of the board would have disclosed its defects. The authorities cited under the following paragraph of this brief have a clear bearing on the erroneousness of that instruction, which we urge is prejudicial error.

II.

The second, third and fourth assignments of error all bear upon the same question and may be considered together. The question is, "Did the mere breaking of this board justify an inference by the jury of actionable negligence?" In other words, when the only proof is that the board broke when stepped upon does the doctrine or *res ipsa loquitur* apply and furnish from the mere breaking of the board a presumption of negligence. If not, the motion for a non-suit should have been sustained because the evidence was not sufficient to justify the submission of the question to the jury, and the motion for a new trial should have been sustained for the same reason.

As we understand this proof, it is only shown that when the Defendant in Error stepped upon the board it broke and precipitated her to the ground and injured her. The mere breaking of the board, as the trial court told the jury, and which is the law, will not justify an inference of negligence, or make the doctrine of *res ipsa loquitur* applicable to this case. *Res ipsa loquitur* does not dispense with proof of negligence on the part of the plaintiff, and only applies in cases where the breaking of the board is surrounded by sufficient circumstances tending to show negligence, as will authorize the presumption of negligence from those circumstances coupled with the breaking of the board. There is no circumstance tending to show that this board was not properly selected. The facts and circumstances do show that the board was a painted board, one of the regular seats out of many hundred in all probability that was used in the circus, it had been in use and had stood the test. The proof does show in the testimony of Mr. Eichelbarger that the appearance of the board showed no defects. Such defects as there were in that board were covered by the paint. There is nothing even tending to show that an inspection of the board would have revealed the defect, or that an inspection was not made. The facts and circumstances surrounding the breaking of the board show nothing from which negligence could have been inferred and there are no facts or circumstances pointing to negligence, hence we say

the maxim of *res ipsa loquitur* does not apply.

That maxim does not change the burden of proof. It is an exception to the general rule that the plaintiff must prove negligence. That maxim is and should be applied with caution. It only applies when the accident is of a kind that it could not have happened unless there was negligence. In order for there to be negligence in this case a bad board must have been originally installed, or if it afterwards became weak such an inspection as an ordinarily careful and prudent person would have made under like circumstances must have disclosed the weakness. The proof must show prima facie that the injury could not have happened without negligence on the part of the defendant. We sub- that there is no showing that this board was originally defective, that it was not inspected, or that an inspection would have disclosed the weakness. The plaintiff was bound to show that an inspection would probably have shown the defect. Negligence cannot be left to conjecture from the breaking of the board which is all the proof shows, the inference is just as potent that an inspection would not have shown the defect as it is that the defendant should have known it and avoided the injury.

If it is the law that the mere breaking of the board will not justify the inference of negligence or the application of the doctrine of *res ipsa loquitur*, then this judgment should be reversed because there is no potent facts or circumstances outside of the breaking of the board from which negligence would

be inferred. If there are any such facts and circumstances, what are they, and what weight and worth do such facts and circumstances have when separated from the breaking of the board?

There is no proof that this accident could have been avoided with proper diligence on the part of the Plaintiffs in Error. If this judgment must stand, it is because the mere breaking of the board is prima facie evidence of negligence; that is based upon the presumption without any proof whatever of circumstances or otherwise to sustain it. That an inspection such as an ordinarily careful person would make under all the circumstances would have discovered the defect. One presumption based upon another presumption. Such ought not to be the law. The doctrine of *res ipsa loquitur* is generally applied to cases only where the defendant is bound to use extraordinary care, where he is in the attitude of being the next door neighbor to an insurer.

The manner in which the board broke has no tendency to prove negligence. Speaking from common experience only, we do not believe that any man can tell whether a board is going to break with the grain, or across the grain; whether one end of the board is going to have a splinter on it or not. There would seem to be nothing in the manner in which the board broke that would tend to show negligence. The rule is that the acts of the defendant must speak negligence, and that negligence cannot be inferred from the mere happening of the ac-

cident. Applying that rule to the case at bar, there is clearly no liability. There must be some proof of negligence before the inference of negligence will arise.

The defendant, so far as the plaintiff's proof is concerned was in no better position, in the case at bar, to explain why this board broke than was the plaintiff. It was a latent defect and the proof shows only that the plaintiff was injured by an accident. The proof must necessarily point to negligence before *res ipsa loquitur* has any application. Such would not seem to be the tsatus of the proof in the case at bar.

Res ipsa loquitur being an exception to the general rule, should be applicable only when the nature of the accident itself not only supports an inference of defendant's negligence, but excludes all others.

The Plaintiffs in Error were engaged in a lawful occupation by lawful means and authorized instrumentalities, and until there is some proof of negligence, they ought not to be held liable. The court ought to hold that the inference to be drawn from the proof in the case at bar, was that of an unavoidable accident. At least the presumption was no more favorable to the doctrine of negligence than it was to that of an unavoidable accident.

It would seem that the complaint does not state a cause of action. The mere allegations that the seat was weak and defective and the said accident was caused solely by the negligence of defendant

in placing in said row or bank of seats, the said defective, weak seat, and directing the plaintiff to seek a seat in said bank is not sufficient; I submit that the word "negligently" ought not to supply the necessary allegations that the defendant acting as a reasonably prudent man should have known that it was weak and defective and not placed it there. They have pleaded all that their proof sustains; barring the word "negligently" there is nothing in that complaint tending to show that the defendant in this action did not exercise ordinary care; and last having specifically pleaded the negligence that they relied on, the maxim of *res ipsa loquitur* has no application.

We respectfully submit that the following authorities clearly hold that the motion to dismiss and for a non-suit should have been sustained; that the evidence was not sufficient to authorize the submission of this case to a jury; that the plaintiff did not discharge the burden which rested upon her of showing facts and circumstances which necessarily pointed to negligence.

> "The rule of *res ipsa loquitur* is always applied with caution and only where there is an absence of positive proof of any definite act of negligence or want of skill, though the accident itself is of an unusual and extraorinary character and one not likely to occur without such cause." *Kight v. Metropolitan Ry. Co.*, 21 App. D. C. 494.
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> "Where in an action for personal injuries

the facts are such that the accident was due to a cause other than the negligence of the defendant, could have been drawn as reasonable as an inference that the accident resulted from defendant's negligence, the doctrine of *res ipsa loquitur* does not apply and plaintiff cannot rely upon mere proof of the facts and circumstances and require defendant to show that he was not negligent." *McGrath v. St. Louis Transit Co.* (Mo.), 94 S. W. 872.

"Where in an action for personal injuries sustained by the falling of a staging, the fall is not prima facie evidence of negligence." *Parsons v. Hecla Iron Works* (Mass.), 71 N. E. 572.

"In an action to recover damages sustained by the falling of certain iron trusses which the defendant was placing in the roof of a building, evidence of the mere fact that the trusses fell and injured plaintiff's intestate, is not in itself proof of negligence on the part of defendant." *May v. Berlin Iron Bridge Co.*, 60 N. Y. S. 550.

"Where plaintiff alleged and relied on negligence of defendant in making repairs of a boiler which exploded killing her husband, the doctrine of *res ipsa loquitur* has no application." *Clark v. Gramby Mining & Smelting Co.* (Mo.), ~~182 S. W. 109~~. 183 Sw. 1099

"Where plaintiff in an action for negligence specifically sets out in full in what the

defendant's negligence consisted, the doctrine of *res ipsa loquitur* has no application." *The Great Northern*, 251 Federal 826.

"Where plaintiff in action for negligence sets out specifically in what negligence of the defendant consisted, doctrine of *res ipsa loquitur* has no application." *White v. Chicago G. W. R. Co.*, 246 Federal 427, 158 C. C. A. 491.

"Doctrine of *res ipsa loquitur* means that circumstances connected with accident are of such unusual character as to justify in absence of other evidence inferences that accident was due to negligence." *Francey v. Ruthland Ry. Co.* (N. Y.), 119 N. E. 86.

"Where the thing which causes an injury is under the management of defendant, and the accident would not have ordinarily happened if those who had such management had used proper care, under the doctrine of *res ipsa loquitur* proof of the happening of the event raises a presumption of the defendant's negligence and casts upon him the burden of showing that ordinary care was exercised; but where the circumstances leave room for a different presumption the reason of the rule fails, and the doctrine cannot be invoked." *McGowan v. Nelson*, 92 P. 40.

"The doctrine of *res ipsa loquitur* does not apply where the cause of the accident complained of is fully explained." *Fizgerald v. Goldstein*, 107 N. Y. S. 614.

"Except where the acts of the defendant speak negligence it cannot be inferred from the mere happening of the accident." *Lone Star Brewing Vo. v. Willie*, 114 S. W. 186.

"The "res" in the maxim, "*Res ipsa loquitur*" is not simply an accident resulting in injury but the accident and the surrounding circumstances, and the doctrine does not permit a recovery without some proof of negligence, but, if the occurrence could not have happened without negligence according to the ordinary experience of mankind, the doctrine is applied, though the precise omission or act of negligence is not specified." *Robinson v. Consolidated Gas Co. of New York*, 86 N. E. 805.

"The mere happening of an accident is not always sufficient to charge one with negligence under the doctrine of *res ipsa loquitur*, and the presumption does not arise unless the surrounding circumstances, necessarily brought into view by showing how the accident occurred, contain, without further proof, evidence of defendant's duty and of his neglect." *Feingold v. Ocean S. S. Co. of Savannah, Ga.*, 113 N. Y. S. 1018.

"Where defendants undertook to underpin the foundation of a building, and while doing so the building fell, such facts alone did not establish negligence, as defendants were not insurers of the successful performance of the work without fault or error of judgment, but

were only liable for negligence, bad faith, or dishonesty." *Kennedy v. Hawkins*, 102 P. 733.

"The part of the rule *res ipsa loquitur* that where defendant is in a position to clear away all doubts as to its alleged negligence, and fails to do so, it would be presumed that negligence existed, only applies where plaintiff has proved a state of facts which, while not free from question, is yet sufficient in the absence of explanation to justify an inference of negligence on the defendant's part, and does not apply where the facts shown are equally consistent with the hypothesis that the injury was caused by the negligence of the injured person, or by that of defendant, or by both combined." *Texas & P. Coal Co. v. Kowsikowsiki*, 125 S. W. 3.

"Since the doctrine of *res ipsa loquitur* involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, it is applicable only when the nature of the accident itself not only supports an inference of defendant's negligence, but excludes all others." *Lucid v. E. I. Du Pont De Nemours Powder Co.*, 199 F. 377, 118 C. C. A. 61.

"That plaintiff and the seat of the buggy on which he sat fell backwards by the breaking of fastenings, when the horse started suddenly, held not to show the owner of the buggy

guilty of negligence." *Davis v. Crisham*, 99 N. E. 959.

"To make the *res ipsa loquitur doctrine* applicable, the circumstances surrounding the accident must, without further proof, furnish sufficient evidence of defendant's negligence." *Hardie v. Charles P. Boland Co.*, 98 N. E. 661.

"The expression of "*Res ipsa loquitur*" is a shorthand method of showing that the circumstances attendant upon an occurrence are of such a character as to speak for themselves in inferring the negligence and the cause of the disaster." *Canode v. Sewell*, 182 S. W. 421.

"The plaintiff, as an employe of F. & Co., was at work on the premises of the defendants in helping to set up a saw mill which the defendants had purchased of F. & Co. While so at work, a steam-boiler, owned and used by the defendants on the premises to run the saw mill, exploded and injured the plaintiff. Held, that in an action for damages the mere fact of the explosion did not raise a prima facie presumption of negligence on the part of the defendants. *Huff v. Austin* (Ohio), 21 N. E. 864.

"In an action against a railroad company for damages from fire alleged to have been set by sparks from defendant's locomotive, the burden is on the plaintiff to prove, not only that the fire was caused by sparks from defendant's engine, but that the emission of such

sparks was due to defendant's negligence." *Garrett v. Southern Ry. Co.*, 101 Federal 102.

We respectfully submit that the Defendants in Error have neither by proof nor presumption established neglicence, and that the judgment should be reversed and the cause dismissed.

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